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In the Supreme Court of the United States

October Term—1947.

No. 522.

HOWARD P. ROOT AND RAY THOMAS, Individually, and as Business Agent and President, respectively, and as Representative Members of AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF AMERICA, LOCAL UNION No. 576, and Other Unnamed Members of said Union, *Petitioners,*

vs.

FRED WOLFERMAN, INC., a Corporation, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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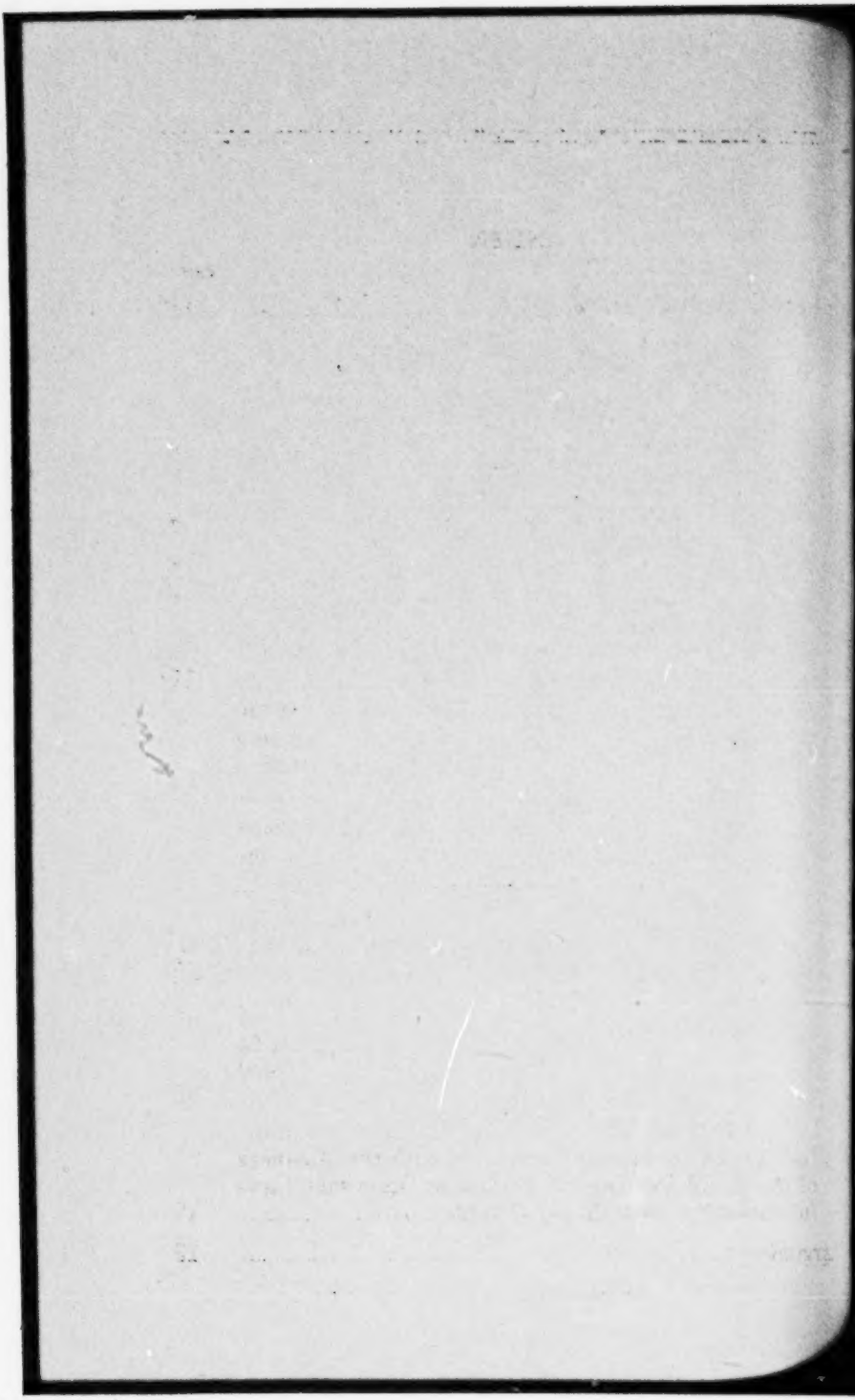

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In the Supreme Court of the United States

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HOWARD P. ROOT AND RAY THOMAS, Individually, and as Business Agent and President, respectively, and as Representative Members of AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF AMERICA, LOCAL UNION No. 576, and Other Unnamed Members of said Union, *Petitioners.*

VS.

FRED WOLFERMAN, INC., a Corporation, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

(Figures in parentheses are pages of the printed record.)

Petitioner Howard P. Root and Ray Thomas, individually, and as Business Agent and President, respectively, and as Representative Members of Amalgamated Meat Cutters and Butcher Workmen of America, Local Union No. 576, and other unnamed members of said Union, pray

that a writ of certiorari be issued to review the judgment of the Supreme Court of Missouri sitting *en banc*, the court of last resort of said state, entered on September 8, 1947 (136). In due time (September 23, 1947) and in proper form and substance petitioners filed motion for rehearing (146) which motion was entertained and heard by the court and was overruled on October 13, 1947 (153).

Opinion by the Supreme Court of Missouri.

The opinion by the Supreme Court of Missouri is found in 204 S. W. (2d) 733 (Advance sheets of November 18, 1947) and is also found in the certified transcript at pages 136 and following.

Jurisdiction.

The petition for certiorari has been timely filed. The motion for rehearing by petitioners filed in the Supreme Court of the State was overruled October 13, 1947. This petition, the record and supporting brief are being duly filed in the office of the Clerk of the Supreme Court of the United States and the case is being docketed within three months from that date. The jurisdiction of this Court is invoked under Title 28, Section 344, Judicial Code 237 as amended.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

I.

Nature of Proceeding Below.

The proceeding below was upon the petition of Fred Wolferman, Inc. (respondent), in the Circuit Court of Jackson County, Missouri, praying for a final order of injunction against Amalgamated Meat Cutters and Butcher Workmen of America, Local Union No. 576, affiliated with the American Federation of Labor, and against officers and members thereof (petitioners) perpetually enjoining them from (a) picketing respondent's places of business (b) from demanding that respondent enter into a collective bargaining contract (c) from attempting to require that respondent require its employees to join the union (d) from publishing that a strike was in effect and (e) other relief (2).

The following excerpt from the opinion of the state court indicates clearly the issue before the Court.

> "After a hearing the trial court permanently enjoined defendants:
>
> (a) 'From making demand that plaintiff sign or enter into a collective bargaining or other agreement with defendants, or the Amalgamated Meat Cutters and Butcher Workmen of North America, Local Union No. 576, so long as the defendants and said local union do not represent the majority of the meat cutters and butchers in the employ of the plaintiff.'
>
> (b) 'From requiring or attempting to require that plaintiff require persons employed by it as butchers or meat cutters, or other employees in plaintiff's meat department to join or become members of the said local union as a condition of their employment or continued employment by plaintiff.'

(c) 'From announcing, publishing or declaring that a strike is in effect at or about the premises of plaintiff's stores and places of business in Kansas City, Missouri, when such is not the case.'

Plaintiff also sought an order enjoining defendants. 'From establishing any picket line or lines in and about plaintiff's stores or places of business which would affect, destroy or interfere with the receipt and delivery of merchandise to and from plaintiff's stores and places of business in the usual and ordinary course of business.'

The trial court refused to enter such order and plaintiff has appealed'' (138-139).

Petitioners acquiesced in the judgment of the lower court but respondent appealed upon the ground that the lower court should have entered an order enjoining defendants from establishing any picket line as specified in the next preceding quoted paragraph. The Supreme Court held that the injunction should have included the provision sought by plaintiff but denied by the lower court and reversed the judgment and remanded the cause for entry of said additional injunctive provision, in the words quoted above (146).

It is the question, of whether the State Court in entering said anti-picketing injunction deprived petitioners of their constitutional rights, timely and specifically invoked as hereinafter specified and amplified, that is presented to the Supreme Court of the United States by this petition.

Controlling Facts From the Record.

There was evidence to show that Wolferman conducted four retail groceries and meat markets in Kansas City, Missouri, employing nineteen butchers, at least three of whom were union men. Plaintiff alleged that the defend-

ants attempted to obtain a closed shop contract and demanded that Wolferman use its influence to induce its butchers to join the union. Wolferman refused to sign the contract because, as alleged, the union did not represent a majority of its butchers and refused to use its influence to cause the butchers to join the union because the Labor Relations Act, 29 U. S. C. A. 151, prohibited it from encouraging employees to join a particular union. A picket line was placed, there was no violence or threats or mass picketing or disturbance of peace (114 and following).

Defendants below by answer and testimony disclaimed certain rights as follows:

> "After the case was assigned to this Division, defendants filed an answer and gave testimony to the effect that they would not request of the plaintiff any collective bargaining contract as the representatives of plaintiff Meat Cutters and Butcher Workmen until and if they should have as members of said local union the majority thereof; and that they would not request of the plaintiff or any of the plaintiff's representatives that they request or urge any of said Meat Cutters or Butcher Workmen to join said local union, but that they desired to picket at plaintiff's stores for the purpose of informing the public of the failure of said Meat Cutters and Butcher Workmen to join said local union" (117-118).

And defendants renounce any intention of picketing in the future for recognition as representative of the Butcher Workmen until a majority thereof shall be members of the local union, and further renounced any intention of picketing to cause the plaintiff to request its butchers to join said union (120). The lower court recited as follows:

> "Defendants request the right to picket at plaintiff's stores for the purpose of informing the public of the failure of the Meat Cutters and Butcher Work-

men in the employ of the plaintiff to join the defendants' union. The court accepts the said statement of the defendants as true. The court finds that picketing for such purpose is lawful and cannot be enjoined" (121).

The lower court also declared:

"The court believes that the defendants if denied the right to picket for the purpose for which they have assured the court they desire to picket as herein stated, would be restraint in their right of free speech as guaranteed by the First and Fourteenth Amendment to the Constitution of the United States and Paragraphs Eight and Twenty-Nine of Article I of the Constution of the State of Missouri. By the issuance of the injunction herein it is not intended by the court to in any way restrain picketing by defendants except for the purpose herein specifically enjoined" (122).

Defendants demonstrated the good faith of their renouncement of the right to picket for any of the alleged unlawful purposes by accepting the decree enjoining them from picketing for such purposes. They asserted in the lower court and in the Supreme Court of the state their right to picket for the sole purpose of informing the public that the meat cutters at Wolferman's were not union men, manifestly a lawful purpose.

The Supreme Court in unavoidable effect enjoined the defendants from peaceably picketing solely for the purpose of informing the public that Wolferman's Meat Cutters were non-union men, if such picketing "would affect, destroy, or interfere with the receipt and delivery of merchandise to and from paintiff's stores and places of business in the usual and ordinary course of business" (146). Petitioners contended and now contend that the right peaceably to picket solely for the specified purpose was a constitutional right of petitioners and that the limitation

placed thereon by the Supreme Court impaired and deprived them of their constitutional rights as specifically invoked.

Defendants (petitioners) at their first appearance in the *nisi prius* court, invoked their constitutional rights and pleaded that the issuance of a restraining order or an injunction as prayed would be to deprive them of their constitutional rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States (23, 24, 147), and particularly freedom of speech and of press and of assembly.

Said constitutional question was carried into the defendants' answer and was submitted to the State Supreme Court and was finally reasserted in petitioners' motion for rehearing (same pages of record).

Reasons Relied On for the Allowance of the Writ.

There are special and important reasons for this Court in this case to exercise a sound judicial discretion and grant the writ.

I.

The Supreme Court of the State of Missouri *en banc*, being the highest court of that state in which a decision could be had, has decided a federal question of substance in a way probably not in accord with applicable decisions of the Supreme Court of the United States (Rule 38-5 (a)).

II.

Petitioners have, in said state court, and in all proceedings therein, specifically set up and claimed a title, right, privilege and immunity under the specified provisions of the Constitution of the United States.

III.

The said state court, in said proceeding, by its final judgment, has deprived petitioners of their title, right, privilege and immunity under the specified clauses of the Constitution of the United States, so set up and claimed.

IV.

The question of the constitutional authority of a state to impose conditions upon peaceable picketing for a lawful purpose in a labor dispute, as was done in a specific manner in this case, is of such transcendent importance in the relationship of labor and employers that it should be settled by an authoritative decision of the Supreme Court of the United States and for that purpose this cause should be brought before that court.

The reasons relied upon for the allowance of the writ are specified and amplified and applied to the record in the brief accompanying the petition, but which for the sake of brevity are not here repeated in detail.

Questions Presented.

I.

Where a labor union engages in peaceable picketing for the sole purpose of informing the public that employees of the employer picketed are non-union men and for the purpose peaceably of inducing such employees to become members of the union, and when the picketing is otherwise lawful, may the court enjoin such picketing if the result thereof "would affect, destroy or interfere with the receipt and delivery of merchandise to and from plaintiff's stores and places of business in the usual and ordinary course of business," without such injunction violating the provisions of the Constitution as herein specified?

II.

May a court, consistent with fundamental rights of free men preserved and guaranteed in Amendments One and Fourteen to the Constitution of the United States, enjoin peaceable and otherwise lawful picketing by a labor union in a labor dispute, for the sole reason that in the court's opinion such picketing would "affect, destroy or interfere with" the conduct of the business as regards receipt and delivery of merchandise?

III.

Is the constitutional right of labor peaceably to picket for lawful purposes in a labor dispute, conditioned that such picketing shall not "affect, destroy or interfere with" the conduct of the business of the employer as regards receipt and delivery of merchandise?

IV.

Is not the condition imposed by the state court to peaceable picketing for a lawful purpose in a labor dispute, in and of itself, such an impairment of the constitutional rights of labor that it is in effect a denial of such constitutional rights?

Conclusion.

Wherefore and by reason of all which the petitioners respectfully pray that this Court shall issue its writ of certiorari to the Supreme Court of the State of Missouri *en banc*.

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vs.

FRED WOLFERMAN, INC., a Corporation, *Respondent.*

BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

I.

The petition for the writ of certiorari contains, so that there is not here repeated, the following:

(a) Reference to the official report of the decision below.

(b) Statement of the grounds on which the jurisdiction of this court is invoked.

(c) A concise statement of the case containing all that is material to the consideration of the questions presented.

(d) Questions presented.

(e) Reasons relied upon for the issuance of the writ.

II.

There is in this brief presented:

(a) Specification of the assigned errors.

(b) Further specification of the grounds and reasons for the court to exercise its discretion for the issuance of the writ, supporting citations and application thereof to the record herein.

(c) Argument.

Specification of Errors Intended to Be Urged.

A.

The court of last resort in the State of Missouri has entered or directed to be entered, a final injunction enjoining a labor union and its officers and members in a labor dispute from peaceable picketing for a lawful object where such picketing affects, destroys or interferes with the conduct of the employer's business. Such action by the court deprives, impairs and abridges the constitutional rights of freedom of speech and of the press and of assembly preserved and guaranteed by the First Amendment to the Constitution of the United States.

B.

Peaceable picketing in a labor dispute by banners, word of mouth or other appropriate means is the exercise of freedom of speech and of the press and of assembly

and the injunctive orders of the state court do materially abridge, impair and condition the exercise of such constitutional rights in violation of said constitutional provisions.

C.

Peaceable picketing by a labor union in a labor dispute for the purpose of inducing employees of the employer picketed to become members of the union is for a lawful purpose and such picketing may not be enjoined without violating the said constitutional rights of petitioners.

D.

The restrictions placed upon the right of peaceable picketing for a lawful purpose by the injunction issued by the state court constitute in and of themselves a denial and abridgement of said constitutional rights and for said reason said injunctive order is void.

E.

The fact that peaceable picketing for a lawful purpose may seriously interfere with the conduct of the business and even work apparent injustice to the employer does not change otherwise lawful picketing into illegal conduct.

ARGUMENT.

Peaceable picketing, in a labor dispute, by exhibition of banners, distribution of pamphlets and other literature, by word of mouth and by other means appropriate and expedient to ordinary and usual picketing by labor unions, is the exercise of freedom of speech and of the press and of assembly, preserved, guaranteed and protectd by Amendments One and Fourteen to the Constitution of the United States.

Not only may such rights not be denied but they may not be materially abridged, impaired or conditioned.

The constitutional prohibition is against "abridging the freedom of speech or the press."

The foregoing provisions of constitutional law have been clearly, expressly and of late years uniformly decided by the Supreme Court of the United States. The leading cases are as follows: *Senn* v. *Tile Layers Union,* (May 24, 1937) 301 U. S. 468, 57 S. Ct. 857, 81 Law Ed. 1229; *Thornhill* v. *Alabama,* (April 22, 1940) 310 U. S. 88, 60 S. Ct. 736, 84 Law Ed. 1093; *Carlson* v. *California,* (April 22, 1940) 310 U. S. 106, 60 S. Ct. 746, 84 Law Ed. 1104; *American Federation* v. *Swing,* (February 10, 1941) 312 U. S. 321, 61 S. Ct. 568, 85 Law Ed. 855; *Milk Wagon Drivers Union* v. *Meadowmoor,* (February 10, 1941) 312 U. S. 287, 61 S. Ct. 552, 85 Law Ed. 836, 132 A. L. R. 1200; *Bakery Drivers Union* v. *Wohl,* (March 30, 1942) 315 U. S. 769, 62 S. Ct. 816, 86 Law Ed. 1178; *Carpenters Union* v. *Ritter's Cafe,* (March 30, 1942) 315 U. S. 722, 62 S. Ct. 807, 86 Law Ed. 1143; *Cafeteria Union* v. *Angelos,* (November 22, 1943) 320 U. S. 293, 64 S. Ct. 126.

The Extended quotations are unnecessary but some pertinent language of the Supreme Court is not inappropriate.

"For the reason set forth in our opinion in *Thornhill* v. *Alabama, supra,* publicizing the facts of a labor dispute in a peaceful way, through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgement by a state." *Carlson* v. *California,* 310 U. S. 106, 60 S. Ct., l. c. 749

"The freedom of speech and of the press which are secured by the First Amendment against abridgement by the United States are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgement by a state. The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and feasible reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evils averted by the courageous exercise of the right of free discussion. Abridgement of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of corrective error through the processes of popular government." *Thornhill* v. *Alabama,* 310 U. S. 88, 60 S. Ct. 740-741.

The court then proceeded squarely to a decision of whether freedom of speech as preserved in the Constitution is applicable to peaceable picketing and having squarely met the question, squarely decided it.

"In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitu-

tion. *Hague* v. *C. I. O.,* 307 U. S. 496, 59 S. Ct. 954, 83 Law Ed. 1423; *Schneider* v. *State,* 308 U. S. 147, 155, 162, 163, 60 S. Ct. 146, 151. See *Senn* v. *Tile Layers Union,* 301 U. S. 468, 478, 57 S. Ct. 857, 862, 81 Law Ed. 1229." *Thornhill* v. *Alabama,* 310 U. S. 88, 60 S. Ct. l. c. 744.

II.

Peaceable picketing by a labor union in a labor dispute for the purpose of inducing employees of the employer picketed to become members of the union, or to obtain by lawful means a majority of the employees as a bargaining agent or unit is for a lawful purpose and is an exercise of constitutional right that cannot be abridged by the legislature or by a court.

Yoerg Brewing Company v. *Brennan,* 54 Fed. Supp. 625.

Park and Tilford Corporation v. *International Brotherhood (California)* 165 Pac. (2d) 891.

The case of *Yoerg Brewing Company, et al.,* v. *Brennan, et al.,* 59 F. Supp. 625, was one in which one union had been certified as the collective bargaining agent for the employees of the Brewing Company by the National Labor Relations Board. A rival union continued its activities in its effort to organize the workers. The Brewing Company commenced an action in the United States District Court of Minnesota "to restrain all activity of defendants in furtherance of an alleged illegal strike." Such a restraining order was issued. Defendants filed a motion to vacate the restraining order and dismiss the bill, which motion was granted. The court stated at l. c. 626:

> "The question raised, being deemed highly important and novel, the judges of this district sat *en banc.*"

The judges were Nordbye, Joyce and Bell.

That court said at l. c. 629:

"At the outset, it should be noted that there is an utter absence of any provisions in the National Labor Relations Act, 29 U. S. C. A. 151 *et seq.*, which require a union to cease a labor dispute because of the certificate of the Board designating another union as the sole bargaining agent and representative of the employees. True, the minority union has no standing as the collective bargaining agent of the employees covered by the election, but the Board's mandate does not prevent the minority union from striking or otherwise seeking to manifest its dissatisfaction or opposition to the results. Its right to strike is preserved by Section 163, Title 29, U. S. C. A., which provides: 'Nothing in sections 151-166 of this title shall be construed so as to interfere with or impede or diminish in any way the right to strike.' Certainly, it is clear that no court has authority to order the striking teamsters back to work. In absence of some prohibition in the National Labor Relations Act, it seems logically to follow that this strike may continue in so far as it may pursue lawful means to publicize its grievances. That there are legitimate channels in which the striking union may direct its activities seems quite apparent. * * * The strkers, it would seem, have the unquestionable right to inform their fellow members of the American Federation of Labor, as well as the public, that they are on strike in protest against representation by the Brewery Workers' Union. The strikers presumably may labor through the medium of a strike in the hope that such activities may cause the Board to change its views regarding the propriety of having a craft election rather than representation by a so-called industrial union. Through the medium of the strike, the strikers may entertain the hope that some members of the Brewery Workers' Union may perchance desert that union and come into the ranks of the American Federation of Labor. These and other objectives and aims were not foreclosed by the

Board's determination. If we grant that the Teamsters' Union has a right to strike and that in carrying out such a strike it may lawfully publicize its grievances, can there be any serious question that there now exists a labor dispute and that at least some of the activities of the strikers which are sought to be curtailed are inextricably part of such strike." (Emphasis supplied.)

The case of *Park & Tilford Import Corp.* v. *International Brotherhood, etc.*, 165 Pac. (2d) 891, decided by the Supreme Court of California, January 31, 1946, is factually remarkably similar to this case. In that case the court said (l. c. 894):

"Under the National Labor Relations Act a union may engage in concerted activities to win over a majority of the employees to a closed shop, even though it does not then represent a majority. In section 1 of the National Labor Relations Act, 29 U. S. C. A. 151, Congress declared it 'to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce * * * by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.' As part of that policy employees were guaranteed the right 'to engage in concerted activities, for the purpose of collective bargaining or other mutual aid for protection.' 7, 29 U. S. C. A. 157. The act recognizes among other rights, peaceful picketing and boycotting of an employer by a labor union, whether or not its members are employed by him. Such rights may be exercised to secure a closed shop, for the act specifically designates the closed shop as one of the ob-

jectives of collective bargaining. 8 (3), 29 U. S. C. A. 158 (3). Section 2 of the act, 29 U. S. C. A. 152, defines the term 'employee' as 'not * * * limited to the employees of a particular employer' and thus makes it clear that the right of employees under section 7 of the act 'to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection' can be exercised by a union that does not represent the majority required for a closed shop contract or that does not even include any members who are in the employ of the particular employer. (Citations.) Thus the National Labor Relations Act does not require that a union represent a majority during the period of its activities for a closed shop, but only that it represent a majority when the agreement is made. A union may picket and boycott an employer's business with the object of so discouraging public support of the business that the non-union workers will face the prospect of the loss of their jobs. If a union could not do so unless it had the majority necessary for a closed shop agreement, it would be deprived of one of the most effective means of obtaining that majority."

The court further said at l. c. 897:

"The outcome of concerted activities for a closed shop depends largely on public sentiment. No competitive business can endure indefinitely without good will; no group of workers can long define the terms of its employment without public support. In seeking to enjoin defendants' lawful activities, plaintiff in effect asks the court to preclude any possibility that public sentiment will crystallize in favor of a closed shop in plaintiff's business. The court could not do so without denying to defendants their constitutional right of freedom of speech. *American Federation of Labor* v. *Swing*, 312 U. S. 321, 61 S. Ct. 568, 85 L. Ed. 855; *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293, 296, 64 S. Ct. 126, 88 L. Ed. 58; *Thornhill* v.

State of Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093; *Carlson* v. *People of State of California*, 310 U. S. 106, 60 S. Ct. 736, 84 L. Ed. 1104."

And again at l. c. 898:

> "But the right of workmen to organize for the purpose of bargaining collectively would be effectually thwarted if each individual had the absolute right to remain 'unorganized.' "

In the Park & Tilford case the trial court enjoined all picketing. The Supreme Court modified that order exactly as the trial court modified the restraining order in this case (l. c. 900):

> "The judgment is therefore modified by limiting the injunction to the enjoining of defendants from making demands in connection with their concerted activities that plaintiffs sign a closed shop contract with defendants or coerce its employees to join defendant unions so long as they do not represent the requisite majority of plaintiff's employees."

III.

The fact that peaceable picketing may most seriously interfere with the conduct of business and even work apparent injustice to the employer or third persons, does not change otherwise lawful picketing into illegal conduct.

For a court to enjoin peaceable picketing, otherwise lawful, because such picketing affects, destroys, or interferes with the conduct of the business of the employer, in all its aspects is for the court to deny to labor its constitutional rights. The lower court enjoined picketing for every illegal purpose and this was accepted by petitioners, but the Supreme Court went further and enjoined picketing for a lawful purpose if such picketing affected, destroyed, or

interfered with the conduct of the business as specified (139). In this respect the court unlawfully impaired, abridged, and conditioned the exercise of a constitutional right.

In the case of *Park & Tilford* v. *International Brotherhood* (Calif. 165, Pacific Reporter (2d) 891, l. c. 896), the court said:

> "Picketing and boycotting unquestionably entail a hardship for an employer when they affect his business adversely. The adverse effect upon the employer's business that may result from the competition among workers for jobs is comparable to the adverse effect on his business that may result from his own competition with other employers. It is one of the risks of business. See *C. S. Smith Met. Market Co.* v. *Lyons*, 16 Cal. (2d) 389, 398, 106 P. (2d) 414. 'The law * * * permits workers to organize and use their combined power in the market, thus restoring, it is thought, the equality of bargaining power upon which the benefits of competition and free enterprise rest. Accordingly, the propriety of the object of workers' concerted activity does not depend upon a judicial determination of its fairness as between workers and employers.' 4 Restatement: Torts, p. 118. In *Stillwell Theatre Inc.* v. *Kaplan*, 259 N. Y. 405, 182 N. E. 63, 65, 84 A. L. R. 6, an employer, bound by a closed shop agreement with one union, suffered great hardship when his theatres were picketed by another that sought to win over his employees. The New York Court of Appeals denied injunctive relief, declaring: 'The Court of Appeals has for many years been disposed to leave the parties to peaceful labor disputes unmolested when economic rather than legal questions were involved. The employer, if threatened in his business life by the violence of the unions or by other wrongful acts, might have the aid of the court to preserve himself from damage threatened by the recourse to unlawful means, but the right of the work-

man to organize to better their condition has been fully recognized. The fact that such action may result in incidental injury to the employer does not in itself constitute a justification for issuing an injunction against such acts.' See *United States* v. *Hutcheson*, 312 U. S. 219, 232, 61 S. Ct. 463, 85 L. Ed. 788; *Fur Workers' Union No. 72* v. *Fur Workers' Union No. 21238*, 70 App. D. C. 122, 105 F. (2d) 1." (*Park & Tilford* v. *International Brotherhood, Pac. R.* (2d) 165, 891, l. c. 896.)

The same conclusions are announced by the Supreme Court in the case of *Senn* v. *Tile Layers Union*, 301 U. S. 468, l. c. 482, 57 S. Ct. 857, l. c. 863, and in the other decisions by this court.

In the three-judge case, *Yoerg Brewing Company* v. *Brennan*, 59 Fed. Sup. 635, the court said:

> "The right of labor to publicize its grievances if it does so in a peaceful manner, regardless of the apparent injustice to third parties, has been upheld by the Supreme Court in such sweeping language that no doubt can now exist as to this right. *Carlson* v. *People of State of California*, 310 U. S. 106, 60 S. Ct. 746, 84 L. Ed. 1104; *American Federation of Labor* v. *Swing*, 312 U. S. 321, 61 S. Ct. 568, 85 L. Ed. 855; *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293, 64 S. Ct. 126, 88 L. Ed. 58." (*Yoerg Brewing Company* v. *Brennan*, Fed. Sup. 59, 625, l. c. 632.)

IV.

The abridgement and impairment of labor's constitutional right to picket for a lawful cause amounts to a denial of such constitutional rights.

It is to be noted that the first amendment does not prohibit denial of the right of free speech and of the press and of assembly, but it prohibits abridgement thereof. The

choice of the word was not accidental and its use was to make emphatic that conduct far short of denial was prohibited, if the right were impaired or conditioned or abridged.

Webster defines "abridge" as follows:

> "To reduce, encompass, leaving still relatively complete; to make shorter; to diminish; curtail; as to abridge a visit or distance."

The Federal courts have long and repeatedly declared that freedom of speech and of the press are fundamental rights of all men under free government. These rights were not created by the original constitution, which contained no bill of rights. There omission from the original constitution was that it was clearly understood that these rights were inherent in men and their incorporation in the constitution was unnecessary. (2d Cooley's Constitutional Limitations; *Bridges* v. *California,* 314 U. S. 252; 62 S. Ct. 194.)

Amendment I to the constitution has always been liberally interpreted (*Baxley* v. *United States,* 134 Fed. (2d) 937.) This amendment must be taken as a demand of the broadest scope that explicit language read in context of a liberty-loving society will allow. (*Graham* v. *Jones,* 200 La. 137, 7 Southern (2d) 688.) (*State* v. *Butterworth,* 142 A. 57, 104 N. J. Law 579.)

Where impairment of these constitutional rights is asserted the court should be astute to examine the effect of the challenge and should weigh the circumstances and appraise the substantiality of the reasons advanced in support of the alleged denial. (*Am. Federation* v. *Bain,* 106 Pac. (2d) 544, 165 Oregon 183).

The action of the state court in conditioning the right peaceably to picket was to afford mere form and deny substance, and peaceable, lawful picketing is an economic

weapon to be used to better working relations. It can be effective only if it brings pressure including that of public opinion against the employer. Picketing that brings no pressure or inconvenience or even hardship is useless. When the state court conditioned the right of labor peaceably to picket for a lawful purpose, upon the condition that such picketing should not affect, destroy, or interfere with the conduct of certain phases of the business, it effectively and for all practical purposes took from the constitutional right its entire substance, leaving but a worthless shell.

Respectfully submitted,

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FILE COPY

No. 522.

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In the Supreme Court of the United States

October Term, 1947.

HOWARD P. ROOT and RAY THOMAS, Individually and as Business Agent and President, Respectively, and as Representative Members of Meat Cutters and Butcher Workmen of America Local Union No. 576, and Other Unnamed Members of Said Union, *Petitioners,*

vs.

FRED WOLFERMAN, INC., a Corporation, *Respondent.*

REPLY BRIEF OF PETITIONERS IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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REPLY BRIEF OF PETITIONERS IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 522.

ARGUMENT IN OPPOSITION TO RESPONDENT'S BRIEF.

I.

Issue here involved and question presented thereby.

(Unless otherwise indicated, page references are to the printed record.)

Respondent's statement of "the issue here" is unmistakably and demonstrably incorrect. Respondent says

that the issue is the "form of the final decree" enjoining Petitioners from picketing for "proven unlawful purpose," i. e., (a) pressing the employer to induce his employees to join the union and (b) to sign a contract with the union, which was not the lawful bargaining agent for the employees (Respondent's Brief 1-3). In our judgment, no statement of the issue could well be further from the mark. There is no issue here, nor was there in the Supreme Court of the state, as to the form or substance of the injunction restraining picketing for the specified unlawful purpose. That judgment of the *nisi prius* court is a finality made so by Petitioners' failure to appeal or otherwise draw it in question.

The true issue here is:

(a) Whether constitutionally a state may enjoin peaceable picketing in a labor dispute for a lawful purpose when and because such picketing would "affect, destroy, or interfere" with the conduct of the employer's business in the usual and ordinary manner (139-146). *See note.*

(b) Otherwise put: May a state restrict freedom of speech, as exemplified by peaceable picketing in a labor dispute for a lawful purpose, to cases where such picketing does not "affect, destroy, or interefere" with the conduct of the business in the usual and ordinary course thereof?

(c) Again clear light upon the issue is shed in this wise:

If this Court does not interpose and the Missouri decision stands, then, in the State of Missouri, constitutional freedom of speech, as applied to peaceable picket-

---

Note: The fact that the condition was restricted to non-interference with receipt and delivery of merchandise is of no moment. If the state may condition such freedom of speech upon absence of ill effect upon receipt and distribution of merchandise it could condition the right with respect to any phase, or all phases, of the business.

ing in a labor dispute for a lawful purpose, is in part lopped off, truncated, abridged. Missouri courts may, consistent with the decision in this case, impose, not only the condition here imposed, but also other conditions to lawful picketing, rendering such constitutional right less effective or totally ineffective. That is *the* issue. It directly affects the whole gamut of relationship between employer and employee. It is of that importance which seemingly demands a decision of such question by the Supreme Court.

II.

What the Lower Court Did.

The lower court did enjoin picketing for each and all of the asserted unlawful purposes. That court found as a fact that the unions had renounced any right to picket for such purposes (117), although the Supreme Court said that it could find no such renunciation in the record (142). This is of no consequence. The lower court's injunction was not based upon renunciation, but upon the ground that picketing for the alleged purposes was unlawful. Whether Petitioners renounced the right to picket for said purposes before the injunction was granted is immaterial by reason of the fact that Petitioners acquiesced in such injunction, did not seek by new trial, appeal, or otherwise to draw in question either the form or substance of the decree enjoining them. That injunction was affirmed by the Supreme Court without objection by Petitioners; it is final and subject to enforcement by the effective processes of equity.

III.

What the Supreme Court Did.

The Supreme Court affirmed the injunction in form and substance as had been granted below. The injunction of the *nisi prius* court fairly met each alleged unlawful purpose and effectively enjoined picketing for any and all such unlawful purposes. It did not enjoin picketing for any lawful purpose. The latter court stated:

> "The court believes that the Defendants, if denied the right to picket for the purpose for which they have assured the court they desired to picket (which was 'to picket at the Plaintiff's stores for the purpose of informing the public of the failure of said meat cutters and butcher workmen to join said local union' (118)) as herein stated, would be restraint in their right of free speech as guaranteed by the 1st and 14th Amendments to the Constitution of the United States and by Paragraphs 8 and 29 of Article I of the Constitution of the State of Missouri" (122).

That is, the injunction by the *nisi prius* court, rigidly confined itself to the specified unlawful purposes.

But the Supreme Court went beyond such scope and added a paragraph to the injunction as issued below, dealing with the right to picket for a lawful purpose, and prohibiting such picketing for a lawful purpose if such picketing would affect, destroy or interfere with the conduct of the business in the usual and ordinary course. The Supreme Court wrote into the injunction a prohibition, as follows:

> "From establishing *any* picket line or lines in and about Plaintiff's stores or places of business which would *affect*, destroy, or interfere with the receipt and delivery of merchandise to and from Plaintiff's

stores and places of business in the usual and ordinary course of business'' (138, 139). (Emphasis ours.)

It is manifest that this additional injunctive paragraph was not confined, nor was it intended to be confined, to picketing for unlawful purposes, but on the contrary, extended to picketing for lawful purposes where the results thereof were as specified in said order.

From all of which we submit that it is exceedingly clear that the question here is the constitutional power of a state to place such limitation and *abridgement* upon the right of peaceable picketing for a lawful purpose in a labor dispute.

IV.

Peaceable picketing by a Labor Union, for the purpose of informing the public that given employees are non-union and to induce such non-union men by proper means to become members of the union or to obtain by lawful means a majority of the employees as a bargaining agent, is for a lawful purpose. Enjoining such picketing is a denial of constitutional right.

This subject is dealt with in the brief supporting the petition, pages 15 and following. Apparently respondent does not controvert this postulate. Seemingly the cases of *Yoerg Brewing Company* v. *Brennan* and of *Park and Tilford* v. *International Brotherhood* (Petitioners' Brief, 15), together with the cases and authorities cited in the opinions in said cases are conclusive.

V.

This is not a case such as the milk wagon drivers' case (312 U. S. 287) where lawful and unlawful purpose and violence has, through the years, been so intermingled that the lawful purposes cannot be separated from those unlawful.

In the Milk Wagon Drivers' case, there had been long, systematic and approved acts of violence accompanying picketing so that, the Supreme Court held, if picketing continued, it still carried with it, the momentum of fear generated by past violence, which would survive even though future picketing might be peaceful. This is no such case. The defendants did renounce unlawful purpose, at least, by acquiescing in the injunction which restrained picketing for such unlawful purposes. There has been no intermingling of lawful and unlawful purposes since the injunction was granted. Picketing began October 16, 1946 (8). The restraining order was issued October 18, 1946 (18). There has been *no* picketing since that date. That restraining order continued in full effect until the lower court issued its final injunction on September 18, 1947 (135). The lower court's injunction continued in effect by order of the Supreme Court and the same is in effect today, April 21, 1947 (135).

It must be assumed that the injunctive order against picketing for unlawful purposes will be obeyed or enforced. The injunction by the *nisi prius* court was couched in language clear and sufficient to prevent any picketing for an unlawful purpose. There was no occasion for the Supreme Court to add any clause thereto in order to protect plaintiff's rights against unlawful picketing. The only purpose of the addition of these clauses was, to prohibit lawful picketing if such picketing resulted in affecting, destroying, or interfering with the conduct of the busi-

ness in its usual and ordinary course. Such addition has been effective to that end. Petitioners could not, under this injunction as finally written by the Supreme Court, place a picket for a lawful purpose without being in contempt of court, if the placing of such picket affected, destroyed, or interfered with the conduct of the business in its usual and ordinary course. The standard set by the Missouri Supreme Court was not lawful or unlawful purpose, but was whether the picketing affected, destroyed, or interfered with the conduct of the business, in its usual and ordinary course. Can the court adopt that standard without violating Petitioners' constitutional rights? That is this case.

VI.

The fact that peaceable picketing may seriously interfere with the conduct of business and may work apparent hardship to the employer, does not change otherwise lawful picketing into illegal conduct.

Petitioners' argument, together with authorities upon this proposition are found on pages 19 and following of Petitioners' brief. That argument and authorities seem to have been persuasive as regards respondent's position, because respondent says (Respondent's Brief, page 2):

> "Respondent has never contended, nor will it be contended here, that the purpose of the picketing was unlawful because it interfered with and damaged respondent's business. The effect of a picket line on respondent's business has absolutely nothing to do with whether the picketing was for a lawful purpose" (Respondent's Brief, page 2).

VII.

The Court should exercise its discretion to the end of issuing the writ of certiorari.

This is an earnest appeal by members of a labor union for protection by the Supreme Court of their constitutional right of freedom of speech and of the press and of assembly, under Amendments 1 and 14 to the Constitution of the United States. The question is of utmost gravity. A court must consider with anxious care whether a challenged act materially impairs the fundamental freedoms, not created by the Constitution, but preserved therein, which freedoms inhere in free men living under free government.

So far as we are advised, *no* case can be found where *any* court has put such a limitation as here, upon the constitutional right peaceably to picket in a labor dispute for a lawful purpose. The decision, if permitted to stand, will be the law of Missouri as pronounced by its highest court. Whether such decision should stand, we submit should be decided by this Court, and to that end the writ of certiorari should issue.

This Court, in *Grosjean* v. *American Press Co.* (297 U. S. 233, 56 S. Ct. 444), has, in as clear language as can be found, stated the importance of such an application as is here presented.

That case involved a state tax and license provision upon and concerning the printing of newspapers and magazines. Regarding a claim that the same deprived the parties of their constitutional freedom of speech and of the press, the court said:

> "The first point presents a question of the utmost gravity and importance; for, if well made, it goes to

the heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests. The First Amendment to the Federal Constitution provides that 'Congress shall make no law abridging the freedom of speech or of the press.' While this provision is not a restraint upon the powers of the states, the states are precluded from abridging the freedom of speech or of the press by force of the due process of law clause of the Fourteenth Amendment'' (267 U. S., l. c. 243, 56 S. Ct., l. c. 446).

Respectfully submitted,

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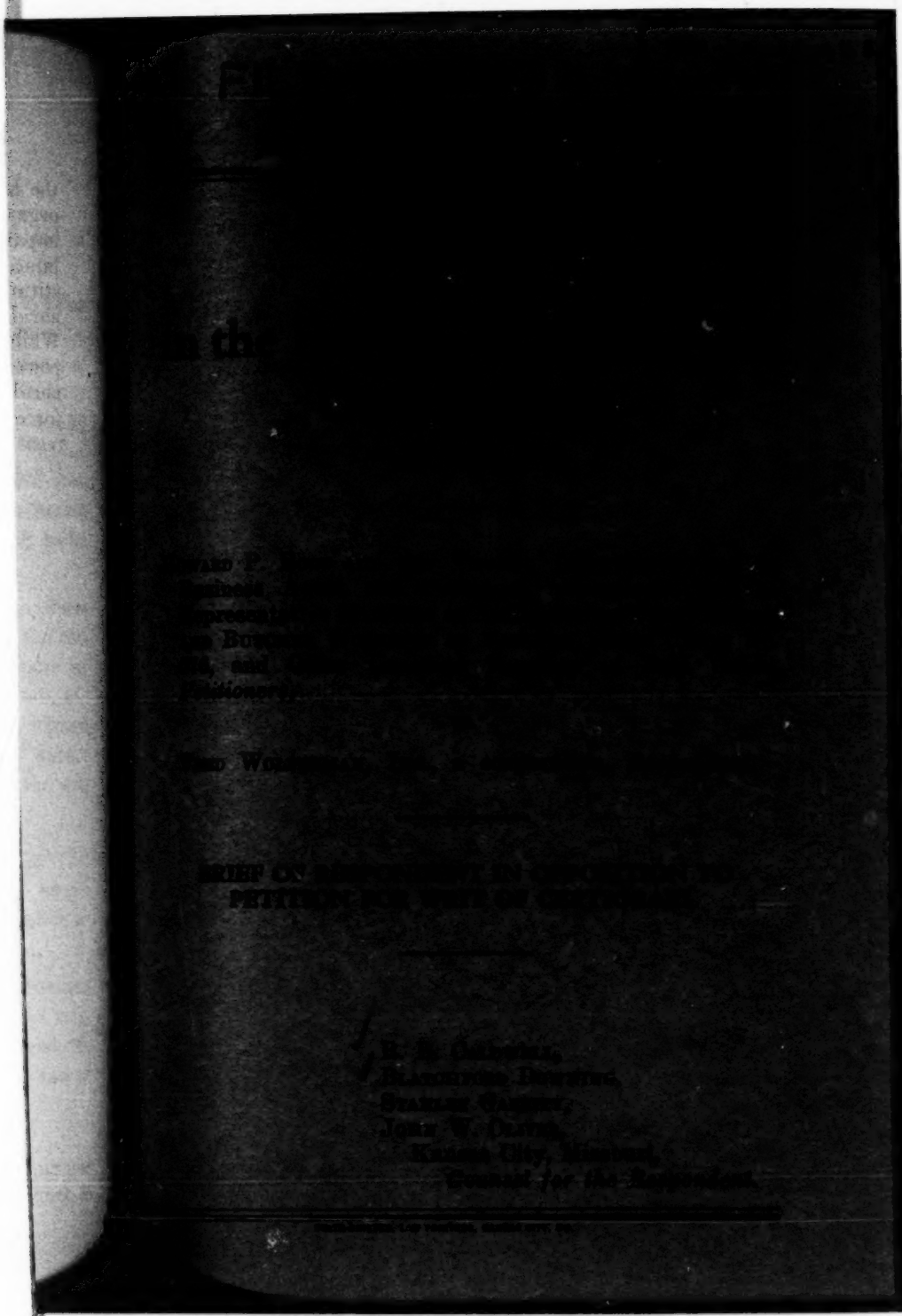

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In the Supreme Court of the United States

October Term, 1947.

HOWARD P. ROOT AND RAY THOMAS, Individually, and as Business Agent and President, respectively, and as Representative Members of AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF AMERICA, LOCAL UNION No. 576, and Other Unnamed Members of Said Union, *Petitioners,*

vs.

FRED WOLFERMAN, INC., a corporation, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

No. 522.

PRELIMINARY STATEMENT.

The issue here relates to the form of the final decree ordered by the Supreme Court of Missouri in an action brought by respondent, as plaintiff, to enjoin petitioners, as defendants, from picketing respondent's stores for the proven unlawful purpose of coercing respondent into violating the express terms of the National Labor Relations Act.

Respondent has never contended nor will it be contended here, that the purpose of the picketing was unlawful because it interfered with and damaged respondent's business. The effect of a picket line on respondent's business has absolutely nothing to do with whether the picketing was for a lawful or unlawful purpose.

When petitioners assert that they have "renounced" the unlawful purposes of the picketing as a premise for their right of relief here (Petition, page 5), they, at the same time, are forced to admit that the purposes of their picketing were unlawful. The record shows that petitioners never in fact renounced those unlawful purposes and the question, therefore, narrows itself to the power of a state court to enjoin picketing for proven unlawful purposes. This case simply does not involve "peaceable picketing for a lawful purpose in a labor dispute" as asserted by petitioners (Petition, page 8, 9).

QUESTIONS PRESENTED.

The actual questions presented by the record are:

1. Do the First and Fourteenth Amendments to the United States Constitution grant to petitioners the right to peacefully picket for the express proven purpose of coercing respondent into violation of the National Labor Relations Act, by (a) forcing its employees to join petitioners' union against their will (R. 140), and (b) forcing respondent to sign a closed shop contract when admittedly petitioners' union was not the lawful bargaining agent? (R. 140)

2. Does an order of the Supreme Court of Missouri enjoining picketing for such unlawful purposes violate the constitutional guaranty of free speech when there has been in fact no renunciation of the unlawful purposes of such picketing (R. 142), particularly when that order provides that it shall not prevent or hinder petitioners "from exercising their right of free speech in informing the public that plaintiff's (respondent's) butchers are not union members"? (R. 146)

STATEMENT OF THE CASE.

The most concise way to state this case is to quote the first three paragraphs of the opinion of the Supreme Court of Missouri. We have inserted in parentheses after each sentence of the Supreme Court of Missouri's statement appropriate references to the record.

Statement From Supreme Court of Missouri (R. 136-137).

"Fred Wolferman, Inc., the plaintiff, operates four retail grocery and meat markets in Kansas City (R. 114, 2, 24). It employs nineteen butchers, at least three of whom are union members (R. 115, 2, 24). Plaintiff's other employees, including the truck drivers, belong to unions (R. 117, 47). Defendants Root and Thomas are the Business Agent and President, respectively, of the Amalgamated Meat Cutters and Butcher Workers of America, Local Union No. 576 (R. 114, 2, 24). They arranged a meeting to which plaintiff's butchers were invited for the purpose of inducing them to join the union (R. 115, 48). Fifteen of the nineteen butchers attended (R. 70). They voted twelve to three against joining (R. 70). Despite the result of the vote, defendants attempted to obtain from plaintiff a closed shop contract with their union (R. 115, 6, 25). Defendants also demanded that plaintiff's executives use their influence to force their butchers into the union (R. 115, 74). Defendants threatened plaintiff that unless their demands were met they would cut off deliveries to and from plaintiff's stores, close their stores and put plaintiff out of business (R. 115, 73). There is testimony that defendants knew their demands were unlawful but told plaintiff 'with a little support on our (plaintiff's) part, no doubt the boys could be persuaded to join'

(R. 74). Plaintiff refused to sign the contract because defendants' union did not represent a majority of plaintiff's butchers and under the National Labor Relations Act plaintiff could not lawfully make the contract (R. 116, 73). Said act also prohibits plaintiff from encouraging its employees to join a particular union (R. 115). Defendants concede plaintiff is subject to the act (R. 117, 110).

Upon plaintiff's refusal of defendants' demands defendants established a 'recognized' picket line at all plaintiff's stores (R. 116, 93-95). The banner carried by the pickets incorrectly stated there was a strike, but there was no strike (R. 116, 28). A 'recognized' picket line is one which has been sanctioned by the Central Trades Union, the Teamsters Joint Council, and the Building and Construction Trades Council (R. 117, 94). All labor unions of Kansas City respect a recognized picket line and its members will not cross it (R. 117, 94). As a result union truck drivers would not deliver merchandise to plaintiff's stores, and plaintiff's truck drivers who are unionized would not deliver purchases from the stores (R. 117, 7, 25). Thus practically all supply and delivery of merchandising was shut off (R. 117, 7, 25).

Plaintiff filed a petition for an injunction to restrain the picketing on the ground it was being carried on for an unlawful purpose, namely to coerce plaintiff into signing a contract with defendants' union and to force plaintiff to coerce its butchers into joining defendants' union (R. 116, 2-16)."

Decrees of Trial Court and of Supreme Court of Missouri.

The trial court, after finding that the picketing was for an unlawful purpose (R. 120), refused to enjoin picketing for any purpose (R. 113, 29-31).

It was led into error by an inaccurate statement in petitioners' trial brief (R. 124),(1) and it determined that petitioners had in fact renounced the unlawful purposes of the picketing, and therefore expressly authorized the picketing of respondent's stores to continue (R. 121).

On respondent's appeal, the Supreme Court of Missouri examined the record, both the pleadings and the evidence, agreed with the trial court's finding that the purposes of petitioners' picketing were unlawful (R. 120), but it found that petitioners had not in fact renounced the original unlawful purposes of the picketing (R. 142), and further found as a fact that "the present purposes of the picketing are to coerce" respondent "into taking action forbidden by the National Labor Relations Act" (R. 142). It, therefore, enlarged the trial court's injunction which had enjoined the making of demands, to include an injunction against the establishment of a recognized picket line (R. 139, 146).

The order of the Supreme Court of Missouri, however, expressly provided that it should not prevent or hinder petitioners "from exercising their right of free speech" (R. 146).

---

(1) In an "Additional Memorandum for Defendants" that petitioners filed with the trial court they stated that although there "was evidence that the picketing in the beginning was for the purpose of causing the employer to sign a closed shop agreement (petitioners), in their answer specifically disclaimed any intention of future picketing for such purpose" (R. 124). Petitioners then purported to quote from their answer and erroneously stated that their answer had in fact alleged that the sole purpose of their picketing was to be "to inform the public of the fact that the meat cutters in the employ of the plaintiff are not members of the union and to thereby put economic pressure upon the employer and the said workmen with a view to causing said workmen to join the union" (R. 124-125). Petitioners' answer made no such allegation (R. 27-28). Petitioners' undisputed testimony was clear to the effect that if picketing were permitted it would be for the same unlawful purpose originally contemplated (R. 103 to 107).

The Issue Presented to and the Findings of the Supreme Court of Missouri.

The issue presented to the Supreme Court of Missouri narrowed "down to the single one whether the picketing continued to be for an unlawful purpose" (R. 139). There has never been any real dispute about the facts of this case and there has never been any question about the unlawful objectives of petitioners' original picketing.

The sole question has always been whether "defendants have, in fact, renounced their unlawful purposes in picketing plaintiff's stores as the trial court found" (R. 141).

In deciding this factual issue the Supreme Court of Missouri analyzed both the answer (R. 141) and the testimony (R. 141) and held as follows:

> "We find nowhere in the record before us, neither in any pleading nor in the evidence, any renunciation of the original purposes of the picketing, some of which the trial court found to be unlawful. Since the record shows some of the present purposes of the picketing are to coerce plaintiff, under the threat of closing its business, into taking actions forbidden by the National Labor Relations Act the picketing should be enjoined as unlawful.
>
> We hold the trial court in making its injunction order should have enjoined defendants also from picketing to the extent requested by plaintiff" (R. 142).

The Findings of Fact of the Supreme Court of Missouri Are Supported by the Record.

The findings of the Supreme Court of Missouri are clearly supported by the record. The portion of the answer

under which petitioners claimed they had renounced is quoted in full in the opinion of that court (R. 138). It is apparent that the state court's authoritative construction of this pleading is the only proper construction that may be given it. That answer expressly alleged that if petitioners were permitted to picket it would be for the express purpose of coercing "plaintiff to enter into such (referring to a closed-shop contract) contractual relations with the said union" (R. 28).

The purpose of petitioners' picketing is revealed by the testimony on pages 103 to 107 of the record where Petitioner Root testified.

When the trial court stated that it could not "see why you think you cannot publish the real truth, 'that the employees of the store are unfair to organized labor'" (R. 105) and when petitioner Root was asked if he would "be willing to put on that same banner and say 'This is to notify the public and is not to be recognized or effected or anywise affect any truck driver from attempting to deliver merchandise to this establishment'" (R. 106), he answered that "it is rather obvious that the answer is no" (R. 106).

Petitioner Root also testified that "the reason the answer to that question is obvious, is that (he was) seeking to put economic pressure on the employer" (R. 106).

And as to the purpose of that economic pressure, petitioner Root testified that "the reason why you want economic pressure on the employer is so that he will in turn put a little squeeze on the employees" and that "of course, the purpose of putting the pressure, the economic pressure on the employer * * * is you hope that through that source you will then put the squeeze on the employee and he will join your union" (R. 107).

It is, therefore, apparent that the Supreme Court of Missouri's finding that "there is no evidence of renunciation on the part of the defendants" (R. 141) is amply supported by the record.(2)

Correction of Specific Inaccuracies in Petitioners' Statement.

Pursuant to Rule 27, par. 4, we turn now to the correction of inaccuracies in the statement of the other side. The petition and brief filed by petitioners in this Court follow exactly the pattern first established in the trial court. In the trial court, by successfully misleading that court by a patent misstatement (R. 124-125)(3), petitioners were able to obtain a decision predicated upon the erroneous factual assumption that they had in fact renounced the unlawful purposes of their picketing and they were thereby able to have a case passed upon that was not in fact before that court (R. 142).

The same approach was unsuccessfully followed in the Supreme Court of Missouri because that court held that it "must take the record as the parties made it and as we find it" (R. 142).

When petitioners state to this Court that "Defendants below by answer and testimony disclaimed certain rights as follows * * *" and when they say that "defendants renounce any intention of picketing in the future for recognition as representative of the Butcher Workmen * * * and further renounced any intention of picketing to cause the plaintiff to request its butchers to join the

(2) In their motion for rehearing in the Supreme Court of Missouri petitioners in effect admit the lack of record support for the purported renunciation. They there alleged that "the Supreme Court refuses to accept such statements (referring to the 'fact' of renunciation quoted this Court on pages 5 and 6 of the Petition) because *elsewhere in the record* there is nothing to show such renunciation" (R. 151) (emphasis ours).

(3) See footnote (1), page 6 of this Brief.

union" (Petition, page 5), they do not refer this Court to petitioners' answer or to petitioners' testimony. They instead refer this Court to the reversed opinion of the trial court that they were successful in obtaining in that court by their method of misinforming it as to what their answer actually contained (R. 124).

The Supreme Court of Missouri answered the quoted statement from the trial court's opinion and also removed the base on which petitioners' "statement of fact" to this Court rests (Petition, pages 5-6) by expressly holding that "we find nowhere in the record before us, neither in any pleading nor in the evidence, any renunciation of the original purposes of the picketing * * *" (R. 142).

Without a single reference to the record, petitioners go from their erroneous premise that they have in fact purged themselves of all unlawful purposes by a purported renunciation, to the equally erroneous premise that they sought "the right to picket for *the sole purpose* of informing the public that the meat cutters at Wolferman's were not union men" (Petition, page 6, emphasis ours) and that this purpose was a "lawful purpose" (Petition, pages 8 and 9).

Petitioners' statements relating to the asserted lawful nature of their picketing and to the asserted sole purpose of their picketing all stem from their refusal and failure to state to this Court that the Supreme Court of Missouri refused to follow petitioners' unique interpretation of their answer and testimony as it had appeared in their memorandum to the trial court, and that it felt itself bound to "take the record as the parties made it and as we find it. We may not read into it something it does not contain and which contradicts its express allegations" (R. 142).

The Supreme Court of Missouri Did Not Enjoin the Picketing Because it Damaged Respondent.

Petitioners attempt to have this Court infer that the Supreme Court of Missouri enjoined petitioners' picketing because that picketing might result in damage to respondent's business (See their description of the "questions presented," Petition, page 8). Petitioners likewise assert as a "controlling fact from the record" (Petition, page 4) that the Supreme Court of Missouri "enjoined the defendants from peaceably picketing * * * if such picketing 'would affect, destroy, or interfere with the receipt and delivery of merchandise to and from plaintiff's stores * * *'" (Petition, page 6). The same effort to confuse is made in paragraph A of the specification of errors intended to be urged (Brief, page 11) and a similar attempt is apparent from the innuendo of the argument that "the fact that peaceable picketing may most certainly interfere with the conduct of business * * * does not change otherwise lawful picketing into illegal conduct" (Brief, page 19).

The Supreme Court of Missouri simply did not enjoin peaceful picketing because it found that petitioners' picketing would affect or destroy respondent's business. It enjoined petitioners' picketing because the purposes of petitioners' picketing were "clearly unlawful * * * under the National Labor Relations Act" (R. 140) in that it was carried on "for the purpose of obtaining a contract, and * * * for the purpose of coercing plaintiff to force its employees to join the union" (R. 139-140) and because even if a single lawful purpose was coupled with those unlawful purposes, "the fact that one of several purposes is lawful does not make the picketing lawful" (R. 141).

The Supreme Court of Missouri utilized the only available method it had to prevent petitioners from coercing

respondent into violating the National Labor Relations Act. (R. 141). It did nothing more.

The order of the state court as authoritatively construed by that court provides that petitioners shall not be prevented from exercising their right of free speech to inform the public that respondent's butchers have freely voted not to join petitioners' union (R. 146). The inevitable damage caused by any picket line was not in any way considered or discussed by the Supreme Court of Missouri as a basis or reason for its decision.

SUMMARY OF THE ARGUMENT.

This Court, in the exercise of its jurisdiction, deals with the cases that come before it on the basis of the facts disclosed by the record. It does not consider nonexistent or assumed circumstances.

The question presented to this Court by the record is whether a state court is prohibited by the Constitution from preventing petitioners from carrying out their proven unlawful purpose of coercing respondent into violating the National Labor Relations Act by enjoining petitioners from picketing for such purpose, particularly when the order of such state court specifically requires that such order shall not prevent or hinder petitioners from exercising their right of free speech.

The Supreme Court of Missouri, in deciding the actual question presented by the record in the negative, decided that constitutional question in a way that is in accord with the decisions of this Court.

Freedom of speech, just as the other freedoms specifically mentioned in the First Amendment, is not an absolute freedom. It does not guarantee that one may say anything at any time, anywhere.

Peaceful picketing under some circumstances has been identified with the right of free speech, because speech is sometimes involved in peaceful picketing. But this Court has held that peaceful picketing is more than free speech.

The fact that peaceful picketing is more than free speech renders it subject to more restrictions than free speech standing alone. The mere circumstance that a labor dispute occasions the exercise of free speech does not give that freedom any greater constitutional protection than that to which it might be otherwise entitled.

When coercion to force an unlawful act is added to peaceful picketing then that peaceful picketing involves more than free speech and is therefore subject to state limitation.

The Supreme Court of Missouri enjoined the coercive effect of a picket line that was established for the proven unlawful purpose of forcing respondent to violate the law but it expressly permitted petitioners to exercise their right of free speech.

This Court should reject petitioners' invitation to read a new clause covering peaceful picketing into the Constitution by denying the pending application for the writ of certiorari.

ARGUMENT.

Introduction.

"This court is without power to give advisory opinions • • • It has long been its considered practice not to decide abstract, hypothetical or contingent questions • • • or to decide any constitutional question except with reference to the particular facts to which it is to be applied • • •," *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461, and cases cited therein.

In this case, just as in *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 132, "the petitioner • • • secks to bar all regulation by contending that regulation in a situation not presented would be invalid" (l. c. 132 of 301 U. S.).

Throughout their petition and throughout their brief, petitioners attempt to give this Court the impression that the picketing that was enjoined was picketing that was "for a lawful purpose" (Petition, pages 6, 8 and 9; Brief, pages 11, 12, 19, 21 and 23).

Petitioners elaborately quote from the reversed memorandum opinion of the trial court and base their case upon an assumed renunciation that the Supreme Court of Missouri expressly held (R. 141-142) had never been made (Petition, page 5-6).

It is perfectly apparent that the question presented to this Court is not whether the Supreme Court of Missouri has power to "enjoin • • • peaceable picketing for the sole purpose of informing the public that employees of the employer picketed are non-union men • • • when the picketing is otherwise lawful" (Petition, page 8, Question I). Nor is it the question of whether the Supreme Court

of Missouri has power to enjoin "lawful picketing" or "peaceable picketing for a lawful purpose" (Petition, page 9, Questions II, III and IV). Nor can the Supreme Court of Missouri be convicted of error on the theory that it enjoined "peaceable picketing for a lawful object • • • or for a lawful purpose" (Brief, pages 11 and 12, Specifications A to E, inclusive), or that it enjoined picketing because the picketing caused damage to respondent (Petition, pages 4, 6, 8; Brief 11, 19, 21).

The record shows that the Supreme Court of Missouri only enjoined picketing for unlawful purposes and preserved to petitioners their full right to exercise their acknowledged right of free speech (R. 146). It also shows that the element of damage to respondent's business was not a factor in the state court's decision (R. 136-146).

The Purposes of Petitioners' Picketing Were Unlawful.

Respondent admittedly is "subject to the provisions of the National Labor Relations Act" (R. 160).

The trial court correctly found that prior to the picketing the petitioners sought to have respondent enter into a closed-shop agreement even though the union admittedly did not represent a majority of the employees in the bargaining unit and that "thereupon the defendants urged the plaintiff's said representatives to attempt to persuade said employees to join said local union" (R. 115). The trial court correctly found that respondent refused to do either because both actions would be in violation of the National Labor Relations Act (R. 115). That they would cannot be doubted. See sections 8(2), 8(3), 8(5) and 9(a) of the Act (29 U.S.C.A. §§ 158(2), 158(3), 158(5) and 159(a).

The Supreme Court of Missouri sustained both findings (R. 139-140) because both findings were clearly supported

by the record (R. 4, 25, 73, 75, 76, 106, 107). The reliance of the Supreme Court of Missouri upon the decision of this Court in *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, and the footnote below make further elaboration unnecessary.(4)

Petitioners do not deny, and have never denied, that peaceful picketing for unlawful purposes may be enjoined without doing violence to the Constitution. Petitioners' whole theory of presentation of the case at bar to this Court rests upon the false grounds that (a) the Supreme Court of Missouri in fact enjoined picketing that had a lawful purpose, and (b) that the purposes of petitioners' picketing were lawful because they had in fact renounced their unlawful objectives.

On petitioners' own theory, their case collapses the moment that this Court determines that the Supreme Court of Missouri correctly found that there was no renunciation of petitioners' unlawful purpose of coercing respondent into violating the law.

The method used to eliminate the factor that petitioners concede will defeat them is to attempt to have this Court consider the case as though that factor was not even involved.

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(4) Petitioners have never attempted to contest the proposition that both of their original demands were unlawful in that they attempted to force respondent to violate the National Labor Relations Act. On page 8 of their brief in the Supreme Court of Missouri they frankly stated that the proposition that "picketing, the objective of which is to compel an employer to enter into contractual relations with a labor union, which does not represent a majority of the workers, is for an unlawful objective, and can be enjoined" was "an issue which is not before this Court in this appeal." Similarly, on the same page of their brief in the state court, petitioners stated that the proposition that "picketing with the objective of forcing an employer to urge his employees to join a union is unlawful as in violation of the National Labor Relations Act and should be enjoined" likewise was "not an issue here and we do not intend to take up the time of this Court commenting upon any such cases." Petitioners, in the Supreme Court of Missouri, as they do here, based their entire hope of sustaining the trial court upon the same renunciation theory that they attempt to present to this Court. In both courts of review they proceed without benefit of record references and with complete ignoration of the facts as revealed by the record.

Petitioners, for a third time, ask a court to ignore the record as made by the pleadings and the evidence and to accept from their brief their unsupported statements as to what the record actually shows on the cardinal issue of renunciation. The whole pattern of their presentation is designed to establish, without record support and in direct contradiction of that record, that a renunciation was in fact actually made in this case. Absent a renunciation, petitioners concede that they cannot argue about picketing for a lawful purpose or picketing for the sole purpose of informing the public.

Any accurate statement of the facts, based on the record, demonstrates that there was no renunciation.

The question therefore presented by the record must ignore any purported renunciation. It may be stated as follows: Does the Constitution of the United States prohibit the Supreme Court of Missouri from preventing petitioners from carrying out their proven and unlawful purpose of coercing respondent into violating the National Labor Relations Act by enjoining petitioners from peaceful picketing for that proven purpose, particularly when the order of the Supreme Court of Missouri specifically requires that such order shall not prevent or hinder petitioners from exercising their right of free speech?

The Supreme Court of Missouri, by answering the actual question presented by the record in this case in the negative, decided that question in accord with the applicable decisions of this Court.

Freedom of Speech Is Not an Absolute Right.

Without dissent, this Court in *Bakery & Pastry Drivers and Helpers Local 802* v. *Wohl*, 315 U. S. 769, 775, held that "a state is not required to tolerate in all places and all circumstances even peaceful picketing by an individ-

ual." The dissent in *Carpenters & Joiners Union* v. *Ritter's Cafe*, 315 U. S. 722, 738, states the same thought by holding that "we do not doubt the right of the state to impose not only some but many restrictions upon peaceful picketing" and the majority opinion in that case makes clear that "the circumstance that a labor dispute is the occasion of exercising freedom of expression does not give that freedom any greater constitutional sanction or render it completely inviolable" because "to hold otherwise would be to transmute vital constitutional liberties into doctrinaire dogma" (l. c. 725 and 728 of 315 U. S.).

Petitioners' contentions in this case to the effect that "peaceable picketing • • • is the exercise of freedom of speech • • • not only may such rights not be denied but they may not be materially abridged, impaired or conditioned" (Brief, page 13) and "peaceable picketing • • • is an exercise of constitutional right that cannot be abridged by the legislature or by a court" (Brief, page 15) are not tenable because basically they must rest upon the unsustainable proposition that peaceful picketing is no more than freedom of speech and that freedom of speech is an absolute freedom.

Apart from the proposition that peaceful picketing is not the equivalent of freedom of speech, it is likewise clear that even the exercise of freedom of speech is not an absolute right.

In *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571, this Court unanimously held that "it is well understood that the right of free speech is not absolute at all times and under all circumstances."

This expression echoes Mr. Justice Holmes' trumpet blasts against dogma sounded in the classic cases. In *Frohwerk* v. *United States*, 249 U. S. 204, 206, he stated for the unanimous court "that the First Amendment,

while prohibiting legislation against free speech as such, cannot have been, and obviously was not, intended to give immunity for every possible use of language * * * We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed to make criminal the counseling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech." (5)

Mr. Justice Holmes' most quoted phrase from *Schenck* v. *United States,* 249 U. S. 47, is undoubtedly his statement that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic" (l. c. 52 of 249 U. S.), but as far as this case is concerned the sentence that follows that phrase and the authority that is relied upon is of more direct application.

Immediately following the "shouting fire" phrase, Mr. Justice Holmes stated that "it (the most stringent protection of free speech) does not even protect a man from an injunction against uttering words that may have the effect of force," citing with approval Mr. Justice Lamar's opinion in *Gompers* v. *Buck's Stove & Range Co.,* 221 U. S. 418, 439.

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(5) That Mr. Justice Holmes used "the counseling of murder" merely as an example of counseling the violation of any law is apparent from his opinion in *Fox* v. *Washington,* 236 U. S. 273. The defendant in that case unsuccessfully urged that the Constitution gave him the right to speak out against officials who were enforcing the State of Washington's laws against indecent exposure by breaking up a nudist colony. He encouraged and incited those that "went into the woods * * * with merely the clothes that nature gave them" to persist in the violation of the state law until a newspaper campaign could force the officials "to come to see the brutal mistake of their action and so inform the people." Characteristically, Justice Holmes disassociated this Court from "the wisdom of the defendant, the prosecution, or the act" and held that "All that concerns us is that it cannot be said to infringe the Constitution of the United States." Counseling murder and counseling the violation of laws against complete dishabille are poles apart from a factual viewpoint, but neither is protected by the Constitution. By the same token it cannot be said that "counseling" the violation of the National Labor Relations Act is a constitutional right.

In the *Gompers Case,* Mr. Justice Lamar, speaking for the entire court, which included Mr. Justice Holmes, stated on page 439 (the page relied upon by Mr. Justice Holmes in the *Schenck Case*) held that "the agreement to act in concert when the signal is published gives the words 'Unfair,' 'We Don't Patronize,' or similar expressions, a force not inhering in the words themselves, and, therefore, exceeding any possible right of speech which a single individual may have."

What Mr. Justice Holmes and what Mr. Justice Lamar both had in mind is that picketing invokes more than the mere exercise of free speech. This very practical fact was recognized by petitioners when they established their single picket at the back door of respondent's Walnut street store, outside of the public view (R. 107), and it likewise has been fully recognized by this Court.

Peaceful Picketing Is More Than Free Speech.

Mr. Justice Douglas' concurring opinion in the *Wohl Case* clearly states the proposition. It was there held that:

> "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." (l. c. 776 of 315 U. S.)

Thomas v. *Collins,* 323 U. S. 516, divided the Court into four groups, but on the basic theory under discussion, all of the present members of the Court are shown to be in accord.

Mr. Justice Rutledge, delivering the opinion of the Court, compared the cases involving employers' attempts to persuade employees with respect to joining or not joining unions and noted, citing *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, that "When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed. * * * Of course, espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause" (l. c. 537-538 of 323 U. S.).

Mr. Justice Douglas, speaking for Mr. Justice Black and Mr. Justice Murphy, paraphrased the language quoted above from the *Wohl Case* by holding in a concurring opinion that "No one may be required to obtain a license in order to speak. But once he uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment. That is true whether he be an employer or an employee."

And Mr. Justice Jackson, in concurring, held that "Free speech on both sides and for every faction on any side of the labor relation is to me a constutional and useful right" but he likewise recognized that more than free speech is involved "if the employees or organizers associate violence or other offenses against the laws with labor's free speech, or if the employer's speech is associated with discriminatory discharges or intimidations" and that in such cases, the speech may constitutionally be enjoined to extent necessary.

National Labor Relations Board v. *Virginia Electric & Power Co.*, 314 U. S. 469, demonstrates that the addition of a lawful course of conduct, such as the exercise of free speech disassociated with any other factor, to an unlawful

course of conduct, such as restraint or coercion, does not cleanse or protect the unlawful activity, but that the lawful action loses its immunity from regulation by reason of its contamination with the unlawful purpose. Pouring white paint into a bucket of black does not make the mixture white. The Supreme Court of Missouri held just that in this case when it determined that when an assumed lawful purpose "is coupled, as it is here, with unlawful purposes, the fact that one of the several purposes is lawful does not make the picketing lawful" (R. 141).

The *Virginia Electric & Power Co. Case* held that "conduct, though evidenced in fact by speech, may amount in connection with other circumstances to coercion * * *. And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally * * * may no more be disregarded than pressure exerted in other ways * * *. The mere fact that language merges into a course of conduct does not put that whole course without the range of otherwise applicable administrative power" (l. c. 477-478 of 314 U. S.).

This Court's recognition of the economic fact that picketing is more than free speech is consistent with its recognition that employer's bulletins and employer's speeches in connection with labor disturbances are frequently not made in isolation but that they must necessarily be considered "as part of a pattern of events adding up to the conclusion of domination and interference," *Virginia Electric & Power Co.* v. *National Labor Relations Board,* 319 U. S. 533, 539 (on the second appeal).

It is as sophistic for an employer to contend that an anti-union speech the night before an election, accompanied with some coercive acts, is but the exercise of free speech as it is for a union to contend that all it is

doing when it establishes a recognized picket line for an unlawful purpose is to but exercise its right of free speech. Petitioners in the case at bar recognized this fact when they established only one picket in a "back alley where trucks made deliveries and not out in front of the store to notify the public" (R. 107). Coercion to force respondent to act regardless of the law (R. 73-74) was what petitioners sought and that is what they would have obtained except for the order of the state court.

Coercion to Force a Violation of the National Labor Relations Act Involves More Than the Mere Exercise of Free Speech.

In none of the cases in which this Court has sustained a claim of constitutional protection to picketing has it even so much as intimated that picketing for unlawful purposes is but the exercise of freedom of speech. In fact, in such decisions, this Court has carefully stated that it was not so holding. And the various state courts over the country have interpreted the decisions of this Court in that light. See cases cited in the opinion of the Supreme Court of Missouri (R. 142, 145).

In the eight cases decided by this Court and cited by petitioners on page 13 of their brief, peaceful picketing was enjoined in two cases, *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287, and *Carpenters Union* v. *Ritter's Cafe,* 315 U. S. 722. In the others cases this Court was careful not to substitute peaceful picketing as an absolute and inviolable constitutional right in the stead of freedom of speech.

From *Senn* v. *Tile Layers Protective Union,* 301 U. S. 468, 480, in which Mr. Justice Brandeis was careful to note that the peaceful picketing sustained in that case involved "no effort to induce Senn to do an unlawful act,"

to *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293, 295, in which this Court stated that "continuing representations unquestionably false and acts of coercion going beyond the mere influence exerted by the fact of picketing, are, of course, not constitutional prerogatives," this Court has always recognized that peaceful picketing for unlawful purposes is not constitutionally protected.

Petitioners do not and cannot cite a single case from this or any other court which holds that peaceful picketing to coerce the violation of law is but the exercise of free speech. Actually petitioners do not claim that such a case exists, but they seek to have that very proposition applied by attempting to lead this Court into believing that the state court in fact found that the purpose of their picketing was lawful, but that it enjoined the picketing because it caused damage. The record shows that the Supreme Court of Missouri did neither.

The Supreme Court of Missouri, thirty-five years before this Court had announced the doctrine, recognized the kinship between freedom of speech and peaceful picketing (R. 140). See cases cited on page 140 of the record. (6)

The Supreme Court of Missouri has never departed from its judicial attitude in connection with the identification of freedom of speech with peaceful picketing. In *Rogers* v. *Poteet*, 355 Mo. 986, 1008, 199 S. W. (2d) 378, 393, certiorari denied by this Court, 331 U. S. (Prelimi-

(6) The isolated case of *Park & Tilford Import Corp.* v. *International Brotherhood of Teamsters*, 27 Cal. (2d) 620, 165 P. (2d) 891, decided by the sharply divided Supreme Court of California, and relied upon by petitioners in all three courts, was not overlooked by the Supreme Court of Missouri (R. 145). The Constitution of the United States does not require that either this Court or the Supreme Court of Missouri adopt any particular public policy declared by the Supreme Court of California. That the law of California is consistent with the law declared by this Court and by the Supreme Court of Missouri, see *James* v. *Marinship Corporation et al.*, 25 Cal. (2d) 721, 155 P. (2d) 329, in which it was held that "a state may impose limitations upon picketing or other concerted action if the 'end sought' is not permissible under state law and public policy."

nary Print—Number 4) 847, the Supreme Court of Missouri remanded that case with directions to redraft the decree because "appellants have a constitutional right by peaceful picketing and persuasion and means not involving violence, intimidation and coercion to advocate the cause of their Union and thereby advance their own interests."

And still more recently, on January 12, 1948, the Supreme Court of Missouri in *Ex parte Hunn* and *Ex parte LeVan*, Nos. 40660 and 40671 (not yet published, 21 L. R. R. M. 2212), held that Section 8 of the so-called Madison Labor Act (Missouri Revised Statutes Annotated, Section 10178.208), which provided that "* * * if any person shall picket * * * when no labor dispute exists between such employer and his employees or their representatives he shall be guilty of a misdemeanor," was unconstitutional because that act purports "to abolish the right, not the abuse of free speech as an incident of picketing unless a labor dispute exists * * *. The statute, insofar as it attempts to forbid any and all picketing when no labor dispute exists, is unconstitutional and void."

The Decree in This Case Preserves Petitioners' Right of Free Speech.

The Supreme Court of Missouri specifically noted that the decree sought by respondent (R. 127-129) did not seek to enjoin the "picketing in its entirety" (R. 146). That court held that "the order it is seeking would not prevent or hinder defendants from exercising their right of free speech in informing the public that plaintiff's butchers are not union members" (R. 146). This gloss is respected by this Court. See *Hotel & Restaurant Employees, Local No. 122*, v. *Wisconsin Employment Relations Board*, 315 U. S. 437, 441. It is apparent that petitioners could advise the public that respondent's em-

ployees freely voted not to join petitioners' union by telling everyone that went into respondent's store that this was a fact or this information could "be displayed upon a billboard, published in a newspaper or made by an individual without fear of punishment, regardless of the existence or nonexistence of any labor dispute" *Ex parte Hunn, supra.*

Under the decree in this case the petitioners are perfectly free to use all of the usual avenues of speech to disseminate all the information they want to give the public, but they may not add to and join with that speech the action that is automatically induced by the very presence of a recognized picket line to coerce respondent into violating the National Labor Relations Act.

In *Dorahy* v. *Kansas,* 272 U. S. 306, 311, Mr. Justice Brandeis, over twenty years ago, recognized that concerted union activity could be "illegal because of its purpose, however orderly the manner in which it is conducted." He also recognized that "the right to carry on business—be it called liberty or property—has value" and that "to interfere without just cause is unlawful." A picket line proven to be established for an unlawful purpose is not a just cause. And the identification of free speech with peaceful picketing does not make a picket line merely an exercise of free speech. It is still a picket line and it is still more than free speech.

The decree of the Supreme Court of Missouri follows the theory established by this Court in the cases above discussed.

No Right of Peaceful Picketing Is Guaranteed by the First Amendment.

Petitioners basically claim that they have constitutional protection for "more than speech" (l. c. 776 of 315 U. S.).

Throughout their petition and their brief they consistently refer to an asserted "constitutional right • • • peaceably to picket" (Petition, pages 6, 9), and they repeatedly assert that "for a court to enjoin peaceable picketing • • • if for a court to deny to labor its constitutional rights" (Brief, pages 15, 19, 21, 22, 23). What petitioners basically contend is that they have an unlimited and constitutional right to picket for any purpose, lawful or unlawful.

Picketing is made up of exercising speech, which is constitutionally free, and a lot of other things that are not constitutionally free, but which require justification before they may be lawfully exercised. See *Dorchy* v. *Kansas*, 272 U. S. 306, 311.

When petitioners' argument is stripped of all its verbiage it stands naked as a bold invitation to this Court for it to write into the Constitution a protection that is not there. It asks this Court to hold that peaceful picketing is the exact equivalent of free speech and that the Constitution must be read so as to include peaceful picketing among the activities protected by the Constitution.

Adkins v. *Children's Hospital*, 261 U. S. 525, 545, based its determination upon "an unconstitutional interference with the freedom of contract included with the guaranties of the due process clause." Mr. Justice Holmes' protest against "the dogma, Liberty of Contract" and his point that "contract is not specially mentioned in the text that

we have to construe" (l. c. 568 of 261 U. S.) went unheeded until *West Coast Hotel Company* v. *Parrish*, 300 U. S. 379, 391, recognized that "the Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law."

The Constitution does not speak of freedom of peaceful picketing any more than it speaks of freedom of contract.

Petitioners are protected by the decree of the Supreme Court of Missouri in exercising their rights as guaranteed them by the Constitution. They are not protected in going beyond the exercise of those rights in their proven efforts to coerce the respondent into a violation of law.

This Court has not held that the Constitution may be used as a cover for such action and the decision of the Supreme Court of Missouri so holding decided that question in accord with decisions of this Court.

Conclusion.

For the reasons above stated, we respectfully submit the application for the writ of certiorari should be denied.

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